

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP293

Cir. Ct. No. 2012CV452

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PATRICIA L. AND ZACHARIAH L.,

PLAINTIFFS-APPELLANTS,

v.

OREGON SCHOOL DISTRICT,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
PETER ANDERSON, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 SHERMAN, J. Patricia L., on her own behalf and on behalf of her minor child, Zachariah L., appeals from summary judgment in favor of the Oregon School District dismissing her action for declaratory judgment against Oregon. Patricia sought an order from the court requiring Oregon to provide educational

services to Zachariah, who, at the time, was subject to expulsion from the Janesville School District. Patricia contends that Oregon's decision not to enroll Zachariah or to provide him with alternative educational services violated article X, section 3 of the Wisconsin Constitution, and that Oregon, in acting without notice or hearing, denied Zachariah due process of law when it denied him enrollment. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Prior to November 2011, Zachariah was enrolled as a student in the Janesville School District. In November 2011, an independent hearing officer issued an order concluding that in October 2011, Zachariah engaged in conduct that constituted grounds for expulsion. The hearing officer ordered Zachariah expelled from the Janesville School District for the remainder of the 2011-12 school year and for the entirety of the 2012-13 school year, including 2013's summer school. The hearing officer gave Zachariah the opportunity to be considered for readmission beginning the fall semester of the 2012-13 school year, provided certain conditions were met. The Janesville District Board of Education subsequently approved the order, a decision later affirmed by the State Superintendent of Public Instruction. At least as is pertinent to this appeal, there was no challenge to Zachariah's expulsion.

¶3 In November 2011, after Zachariah was notified of his expulsion from the Janesville School District, Zachariah's foster parent attempted to enroll him in the Oregon School District.¹ However, Oregon denied Zachariah

¹ The day before the hearing was held on Zachariah's expulsion, Zachariah was disenrolled from the Janesville School District. Zachariah's disenrollment status at the time of expulsion is not at issue in this appeal.

enrollment in the district pursuant to WIS. STAT. § 120.13(1)(f) (2009-10),² which authorizes a district to deny enrollment of any student while subject to expulsion in any other district. Although Zachariah had been denied admission in Oregon the previous November, in April 2012, Oregon began providing Zachariah special education services.

¶4 In February 2012, Patricia brought suit against Oregon. Patricia alleged that between November 2011 and April 2012, Oregon violated Zachariah’s “fundamental right” to a public education in violation of article X, section 3. Patricia further alleged that Oregon violated Zachariah’s due process right by failing to provide him with notice or a hearing prior to denying him admission.

¶5 Both Patricia and Oregon moved for summary judgment. The circuit court denied Patricia’s motion, granted Oregon’s motion, and dismissed the action. Patricia appeals.

² WISCONSIN STAT. § 120.13(1)(f) (2009-10) provides:

No school board is required to enroll a pupil during the term of his or her expulsion from another school district. Notwithstanding s. 118.125(2) and (4), if a pupil who has been expelled from one school district seeks to enroll in another school district during the term of his or her expulsion, upon request the school board of the former school district shall provide the school board of the latter school district with a copy of the expulsion findings and order, a written explanation of the reasons why the pupil was expelled and the length of the term of the expulsion.

All references to the Wisconsin Statutes are to the 2009-10 version. We note, however, that the subsection has been renumbered. 2011 Wisconsin Act 105, sec. 16, effective December 21, 2011, renumbered the subsection as WIS. STAT. § 120.13(1)(f)1.

DISCUSSION

¶6 Patricia challenges the circuit court’s entry of summary judgment in favor of Oregon. Patricia contends that the circuit court erred in failing to determine that pursuant to WIS. CONST. art. X, § 3, Zachariah had an individual, fundamental right either to enrollment in the district or to be provided with alternative educational services during the tenure of his expulsion from the Janesville School District. Patricia contends that because of Zachariah’s fundamental right to enrollment or educational services under art. X, § 3, WIS. STAT. § 120.13(1)(f), which authorizes school districts to deny students enrollment during their expulsion, is unconstitutional.³ Patricia also contends that § 120.13(1)(f) is unconstitutional because it violated Zachariah’s right to procedural due process.⁴

¶7 We review summary judgment de novo, applying the same standards as the circuit court. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. A party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and the

³ Although her briefing on the topic is often unclear, Patricia seems to also challenge the constitutionality of the statute that provides for expulsion, WIS. STAT. § 120.13(1)(c). Patricia, however, does not explain why her apparent challenge to § 120.13(1)(c) is timely. So far as we can tell, by limiting her appeal to the period after Zachariah was denied enrollment by Oregon, Patricia has forfeited any argument that § 120.13(1)(c) is unconstitutional. *See Brandner v. Allstate Ins. Co.*, 181 Wis. 2d 1058, 1067, 512 N.W.2d 753 (1994) (“a party’s failure to properly or timely raise issues in the [circuit] court ... results only in a waiver of the opportunity for an appeal as of right on those issues”) (emphasis omitted).

⁴ Patricia’s challenge on appeal is limited to the time period between when Zachariah was denied enrollment in the Oregon School District, November 2011, and when Oregon began providing Zachariah with educational services in April 2012.

moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). To the extent that our review calls for an interpretation of constitutional provisions, our review is likewise de novo. *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996).

¶8 Patricia argues that WIS. STAT. § 120.13(1)(f) is unconstitutional because it violated Zachariah’s individual right to an education and violates procedural due process rights in that it authorizes a school district to deny enrollment to a student during the pendency of the student’s expulsion without first providing the student with the opportunity to be heard. Oregon disagrees.

¶9 We first observe that we need not decide the parties’ disagreement over whether WIS. CONST. art. X, § 3 confers an individual right to an education because, assuming without deciding that Zachariah has an individual right to an education, reversal is not required.⁵

¶10 Even if Zachariah has a constitutionally protected individual right to an education, Patricia admits such a right is not absolute. More specifically, Patricia concedes that students may, in her words, be “totally den[ied] this fundamental right” in “very limited circumstances.” Having conceded that

⁵ WISCONSIN CONST. art. X, § 3 reads in full:

District schools; tuition; sectarian instruction; released time. The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.

Zachariah may be denied his alleged individual right under some circumstances, Patricia does not develop a fact specific argument as to why the circumstances of Zachariah's expulsion do not warrant denying him his alleged constitutional right. *See Associates Fin. Servs. Co. of Wis., Inc. v. Brown*, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (generally, this court does not consider conclusory assertions and undeveloped arguments). At best, Patricia makes a due process argument directed at WIS. STAT. § 120.13(1)(f), which we address and reject next.

¶11 Procedural due process has been described as the requirement that a person whose rights may be affected by a governmental decision is entitled to be heard, and that in order to be heard, the individual must first receive notification. *State v. Thompson*, 2012 WI 90, ¶46, 342 Wis. 2d 674, 818 N.W.2d 904. The fundamental principles of procedural due process are thus notice and the opportunity to be heard. *See City of S. Milwaukee v. Kester*, 2013 WI App 50, ¶13, 347 Wis. 2d 334, 830 N.W.2d 710.

¶12 Patricia argues that before Oregon could decide to deny him enrollment into that district, Zachariah was entitled to a hearing. It is significant that Patricia has not challenged the original expulsion from the Janesville School District on due process grounds. Not only is such a claim forfeit, as we explain in footnote 3 above, but any claim that the expulsion statute, WIS. STAT. § 120.13(1)(c), denies due process would lack merit. Section 120.13(1)(c) provides for, *inter alia*, notice, hearing, counsel and appeal.

¶13 As noted by Oregon, prior to Zachariah's expulsion, Zachariah was provided notification of his possible expulsion and a hearing was held before an independent hearing examiner. At the time Zachariah sought enrollment in

Oregon, Zachariah was subject to a pending order of expulsion, the validity of which Patricia does not challenge.⁶

¶14 Patricia’s due process challenge to WIS. STAT. § 120.13(1)(f) is based on her assertion that we are free to interpret the term “expulsion” in that statute to mean exclusion of a student from a physical school while still being required to provide alternative educational services. However, as Oregon explains, this argument is foreclosed by *Madison Metro. Sch. Dist. v. Circuit Court of Dane Cnty.*, 2011 WI 72, 336 Wis. 2d 95, 800 N.W.2d 442.

¶15 A school district has “explicit statutory authority to refuse to provide educational services to a juvenile who has been expelled pursuant to a valid expulsion order.” *Id.*, ¶¶53. The *Madison Metro.* court explained:

The term “expel” is not defined in the School District Government statutes. The DPI, however, has long interpreted the term to mean that a school district bears no responsibility for providing an education to expelled students.

This construction is supported by the statutory scheme in the School District Government statutes. For example, no school district may be required to enroll an expelled student while an expulsion order is in effect in another district.

Id., ¶¶40–41 (internal citations omitted). Thus, our supreme court has already explained the meaning of expulsion in WIS. STAT. § 120.13(1)(f) and it does not include a continuing responsibility to provide educational services. Moreover, from the above quote, it is clear that the supreme court considers § 120.13(1)(f) to

⁶ “[T]here is no dispute that a school district may expel students who violate certain rules.” *Madison Metro. Sch. Dist. v. Circuit Court for Dane Cnty.*, 2011 WI 72, ¶39, 336 Wis. 2d 95, 800 N.W.2d 442.

be a part of the expulsion statutory scheme, in essence a consequence of expulsion and not a new expulsion requiring separate notice and hearing.

¶16 Patricia has not provided us with any authority that indicates that WIS. STAT. § 120.13(1)(f) is a separate act of expulsion that requires separate due process guarantees. Accordingly, we conclude that Patricia has not developed an argument that Oregon's refusal to enroll Zachariah under the terms of § 120.13(1)(f) violated Zachariah's right to due process. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we do not consider arguments unsupported by citation to authority).

CONCLUSION

¶17 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

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